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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 411 - 412

JAMES A. DAGGS and JOHN BRAITO,
Petitioners,

vs.

GROVER C. KLEIN, Rear Admiral, U. S. Navy, Commandant, Mare Island Navy Shipyard; and JAMES B. FORRESTAL, Secretary of the Navy,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

HERBERT RESNER,
240 Montgomery Street, San Francisco 4, California,
Attorney for Petitioners.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
By NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners James A. Daggs and John Braito respectfully allege:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

These are separate complaints, each of which is for the reinstatement of a civil service employee and for compensation due him, the complaint in each case having been filed in the District Court of the United States, for the Northern District of California, on May 6, 1946. In said complaints your petitioners, the civil servants who were plaintiffs and appellants below, sought the following relief pursuant to the cited statutes:

(1) Reinstatement as a civil service employee at the Mare Island Navy Shipyard in the capacity in which petitioner was employed at the time of his discharge on June 30, 1941.

(2) Compensation to petitioner for the period of his removal at the rate of pay he was receiving on the date of his discharge.

(3) Reinstatement of petitioner's right to accrued leave with pay as the same existed at the date of his discharge.

The cause of action is maintained pursuant to Title 28, United States Code, Section 1331, § 24 and Public Law 671 (effective June 28, 1940, 76th Congress, 54 Stat. 676, 60 U.S.C. App. 1156).

Before any answer was filed or appearance entered by the respondents in the Braito case, Braito filed an amended complaint in the same Court on January 31, 1947.

The complaint in the Daggs case is appended to this petition and marked Appendix A. The first

amended complaint in the Braito case is appended to this petition and marked Appendix B.

On September 3, 1946, respondent James B. Forrestal, Secretary of the Navy, appeared specially in the Daggs case and objected to the jurisdiction of the Court over him, and respondent Grover C. Klein, Rear Admiral of the United States Navy, Commandant, Mare Island Navy Shipyard appeared in the Daggs case and moved to dismiss the suit on various jurisdictional grounds, more particularly set forth in a motion to dismiss, which motion is appended to this petition and marked Appendix C.

On November 27, 1946, the motions of the respondents in the Daggs case were granted and the action was dismissed for the lack of a federal question by the District Court which rendered a memorandum opinion on its order dismissing the action. This opinion is appended to this petition and marked Appendix D.

On January 21, 1947, a timely notice of appeal to the United States Court of Appeals, for the Ninth Circuit, was filed by petitioner, Daggs. This notice of appeal is appended to this petition and marked Appendix E.

After the filing of the first amended complaint in the Braito case, as aforesaid, the respondent James B. Forrestal, Secretary of the Navy, appeared specially in that case on June 23, 1947, and objected to the jurisdiction of the Court over him, and respondent Grover C. Klein, Rear Admiral of the United States Navy, Commandant, Mare Island Navy Ship-

yard, appeared and moved to dismiss the suit on various jurisdictional grounds, more particularly set forth in a motion to dismiss, which motion is appended to this petition and marked Appendix F.

On August 5, 1947, the motions of the respondents were granted and the action was dismissed for lack of jurisdiction over the Secretary of the Navy, who was held by the Court to be an indispensable party to the action. The District Court rendered a memorandum opinion on its order dismissing the Braito action, which opinion is appended to this petition and marked Appendix G.

On August 11, 1947, a timely notice of appeal to the United States Court of Appeals, for the Ninth Circuit, was filed by petitioner Braito. This notice of appeal is appended to this petition and marked Appendix H.

The cases were consolidated for argument for presentation in the Court of Appeals.

On August 9, 1948, the United States Court of Appeals, for the Ninth Circuit, affirmed the order of dismissal in each of the cases. The opinion of the Court of Appeals is reported at 169 Fed. (2d) 174. A copy of this opinion is appended to the petition and marked Appendix I. The Court of Appeals held that the Secretary of the Navy was an indispensable party to the actions, and in the absence of jurisdiction over him by the District Court of the United States, for the Northern District of California, the action could not be maintained.

B. FEDERAL STATUTES INVOLVED.

(1) Petitioners' actions were brought under various statutes of the United States which have been noted, e.g., Title 28, United States Code, Section 1331, and Public Law 671 (effective June 28, 1940, 76th Congress, 54 Stat. 676, 60 U.S.C. App. 1156).

(2) The jurisdiction of the Court of Appeals to entertain the appeal of the petitioners was based upon Title 28, United States Code, Section 1291.

(3) The jurisdiction of this Honorable Court is based upon Title 28, United States Code, Section 1254.

C. QUESTIONS PRESENTED AND REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

(1) The Court of Appeals by its decision in affirming the orders of dismissal in these cases has committed the following errors:

(a) It has decided a federal question in a way in conflict with the applicable decisions of this Court, viz., *Williams v. Fanning,* 332 U.S. 490.

(b) It has departed from the accepted and usual course of judicial proceedings in that such a decision, if allowed to stand, would stultify the process of justice and would effectively and completely deny to petitioners their day in Court.

In this connection, it is clear that the petitioners, long-time residents of Vallejo in Solano County, within the jurisdiction of the District Court of the United States, for the Northern Dis-

trict of California, would be denied their day in Court if they were compelled to travel three thousand miles to Washington, D. C., there to sue and serve the Secretary of the Navy.

The record in these cases shows that not only are the petitioners residents of Vallejo, California, but also that the employment which they claim was unlawfully terminated had its situs there and that the acts of terminating that employment, which they claim are illegal acts, occurred there. The effect of the Circuit Court's decision in affirming the order of dismissal is to deprive petitioners of their day in Court, save and except as they are prepared to spend the necessary time, effort, and money to press their claim in a forum situated three thousand miles from the place of their residence, the place of their employment, and the place where the acts complained of were committed.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court a complete transcript of the records and all proceedings had in said Court of Appeals for the Ninth Circuit in the cases therein entitled "James A. Daggs, Appellant, v. Grover C. Klein, Rear Admiral, U. S. Navy, Commandant, Mare Island Navy Shipyard, and James B. Forrestal, Secretary of the Navy, Appellees, No. 11581," and "John Braito, Appellant, v. Grover C. Klein, Rear Admiral,

U. S. Navy, Commandant, Mare Island Navy Shipyard, and James B. Forrestal, Secretary of the Navy, Appellees, No. 11772," that the said cases may be reviewed and determined by this Court and the decisions therein finally revised; and that said petitioners may have such other and further relief in the premises as to this Honorable Court may seem appropriate.

Dated, San Francisco, California,
November 3, 1948.

Respectfully submitted,
JAMES A. DAGGS,
JOHN BRAITO,
Petitioners.

HERBERT RESNER,
Their Attorney.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
By NORMAN LEONARD,
Of Counsel.

(Appendices Follow.)

Appendix A

In the United States District Court for the Northern District of California, Southern Division

No. 25927-S

James A. Daggs,

Plaintiff,

vs.

Grover C. Klein, Rear Admiral, United States Navy, Commandant Mare Island Navy Yard; James V. Forrestal, Secretary of the Navy,

Defendants.

Complaint for Reinstatement of Civil Service Employee and for Compensation.

Plaintiff complains of the defendants above named and for cause of action against said defendants alleges:

I.

The matter in controversy exceeds, exclusive of costs or interest, the sum of three thousand dollars ($3,000) and arises under the Constitution and Laws of the United States.

II.

That during all of the times herein mentioned plaintiff was and now is a citizen of the United States, being born in Allendale, State of Illinois, on the 7th day of March, 1889, and now residing in the City of Vallejo, County of Solano, State of California.

III.

That during all times herein mentioned plaintiff was and now is a member of the Free and Accepted Masons, and at the time of his removal as hereinafter set forth plaintiff was a member of the United Federal Workers of America, Congress of Industrial Organizations.

IV.

That from November 6, 1926, until being discharged in June, 1941, plaintiff was a Federal Civil Service employee at the Mare Island Navy Yard, located at Mare Island, California, commencing as a second class machinist and at the time of discharge, as hereinafter set forth, was serving as first class machinist, receiving $8.96 pay per day.

V.

That defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times mentioned herein said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U.S.C.A. App. Sec. 1156, providing in part as follows:

> Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. Sec. 652), shall not apply to any civil service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he

may desire to show why he should be retained and not removed.

VIII.

That on or about the 30th day of June, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 24th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

"Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administration officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Daggs, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing."

IX.

That thereafter plaintiff informed said Friedell in writing as follows:

In regard to the charges against me from the Navy Yard, here is my statement.

I went to work on the Navy Yard Nov. 6, 1926. In that time I have put in about 13 years. I took an interest in my work and I always call my supervisor's attention to anything that was not right; my supervisor had me inspect the work of the other men when a job was finished.

The last 4 years I have worked from 4 to 12 P.M., and week ends I work on my ranch so I

have had no time to associate with members or organizations which would or would not advocate the overthrow of the Constitutional form of Government of the United States.

I only belong to the United Federal Workers of America (C.I.O.) Union, and the Masonic Lodge. If either one of these organizations advocate the overthrow of our form of government I would like to be informed of that. Furthermore I have not attended any meetings of any kind, not even the Union or Masonic Lodge, and whoever investigated me and says that I had been to any meetings or that I am active in any organization or whatever it is I am supposed to have done, I say, "It is a lie," and I would like to meet that person face to face and have them prove when I attended these meetings, and what associations or organizations I belong to outside of the two mentioned.

X.

That plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth, and for reinstatement as a civil service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of

plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671 as a condition precedent to the removal of civil service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671 and a violation of the right of plaintiff to due process of law as provided for in the 5th Amendment to the Constitution of the United States.

XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an

organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organizations to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both, as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did espouse the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

XIII.

That plaintiff is wholly without remedy in the premises and unless this court directs the defendants to reinstate plaintiff with compensation for the period

of removal as provided for in Public Law No. 671 that plaintiff will suffer irreparable injury.

XIV.

That at the time of the removal of plaintiff as aforesaid there was due plaintiff certain accrued leave with pay amounting to approximately one hundred fifty dollars ($150.00); that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendant be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such other and further relief as the court may deem proper in the premises.

Gladstein, Andersen,
Resner, Sawyer & Edises.
/s/ By Herbert Resner
And
/s/ Myer C. Symonds,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

James A. Daggs, being first duly sworn, deposes and says:

That he is the plaintiff named in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

James A. Daggs.

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal] /s/ Alice C. Morse,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 6, 1946.

Appendix B

In the United States District Court, for the Northern District of California, Southern Division.

No. 25928-G.

John Braito,

Plaintiff,

vs.

Grover C. Klein, Rear Admiral, United States Navy, Commandant Mare Island Navy Yard; James V. Forrestal, Secretary of the Navy,

Defendants.

First Amended Complaint for Reinstatement of Civil Service Employee and for Compensation.

Comes now plaintiff and, as of right, files this, his first amended complaint herein, and complains of the defendants above named and for cause of action against said defendants alleges:

I.

The matter in controversy exceeds, exclusive of costs or interest, the sum of three thousand dollars ($3,000) and arises under the Constitution and Laws of the United States.

II.

That during all of the times herein mentioned plaintiff was and now is a citizen of the United States, now residing in the City of Benicia, State of California.

III.

That during all times herein mentioned plaintiff was and now is a member of the Order of Sons of Italy in America, a fraternal organization, the Hermann Sons, a fraternal organization, the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and the United Federal Workers of America.

IV.

That during the period 1919 to 1922 plaintiff was a shipfitter at the Mare Island Navy Yard, located at Mare Island, California, and from 1925, until the time of his discharge as hereinafter set forth plaintiff was a Federal Civil-service employee at said Mare Island Navy Yard, commencing as a shipfitter's helper, then becoming a shipfitter, and at the time of his discharge serving as a flange turner receiving $8.64 per day.

V.

The defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times herein mentioned said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U.S.C.A. App. Sec. 1156, providing in part as follows:

> Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. Sec. 652), shall not apply to any civil-service employee of the War or Navy Department or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an op-

portunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits or both, as he may desire to show why he should be retained and not removed.

VIII.

That on or about the 24th day of July, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 26th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

> Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there would not be the least concern on the part of their associations or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.
>
> Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right

to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Braito, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

IX.

That on or about the 4th day of August, 1941, plaintiff informed said Friedell in writing as follows:

In conformity with the proceeding of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you, to be informed of the reason for having been discharged from employment at the Navy Yard (Mare Island), herewith I, John Braito, respectfully and truthfully, wish to submit to you Sir, this statement:

In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915 A. D.

The solemn oath I took on the 26th day of August, 1915, in the Superior Court of San Francisco on which day I became a citizen of the United States of America is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High School, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly prepared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braito family.

The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow

of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and the city of Vallejo, (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable.

In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

As I have been employed in Mare Island Navy Yard for about 19 years, I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter.

X.

That since the 4th day of August, 1941, plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth and for reinstatement as civil-service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671, as a condition precedent to the removal of civil-service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671, and a violation of the right of plaintiff to due process of law as provided for in the 5th amendment to the Constitution of the United States.

XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organizations to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the

provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did advocate the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

XIII.

That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law.

XIV.

That plaintiff is wholly without remedy in the premises, and unless this court directs the defendants to reinstate plaintiff with compensation for the period

of removal as provided for in Public Law No. 671, that plaintiff will suffer irreparable injury.

XV.

That at the time of the removal of plaintiff, as aforesaid, there was due plaintiff certain leave with pay amounting to approximately four hundred dollars ($400.00) that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil-service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such and other further relief as the Court may deem proper in the premises.

Gladstein, Andersen, Resner & Sawyer,

By /s/ Herbert Resner,

By /s/ Norman Leonard,

Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss:

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the within and foregoing action and makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is at present out of the county in which affiant has his office; that he has read the within and foregoing first amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Norman Leonard.

Subscribed and sworn to before me this 30th day of January, 1947.

(Seal) Alice C. Morse,
Notary Public in and for the City and County of San Francisco, State of California.

Acknowledgment of receipt of copy.

[Endorsed]: Filed Jan. 31, 1947.

Appendix C

[Title of Court and Cause.]

Motion to Dismiss.

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds:

I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since the said defendant has his official residence in the District of Columbia and is not an inhabitant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

IV.

That the Complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will effect his rights, orders and statutory responsibilities and duties, is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court.

Wherefore, defendants pray that said Complaint be dismissed with prejudice.

/s/ Frank J. Hennessey,
United States Attorney.
/s/ William E. Licking,
Asst. United States Attorney,
Attorneys for Defendants.

Appendix D

[Title of District Court and Cause.]

MEMORANDUM OPINION ON MOTION TO DISMISS AND ORDER DISMISSING ACTION.

Plaintiff Daggs brought this action in May, 1946, against Rear Admiral Grover C. Klein as Commandant of the Mare Island Navy Yard, and James V. Forrestal as Secretary of the Navy. The relief sought is a mandatory order directed to defendants compelling them (a) to reinstate plaintiff as a civil service employee at Mare Island in the same capacity in which he was serving when he was discharged; (b) to compensate plaintiff for the period of his removal at the same rate of pay he was receiving when he was discharged; and (c) to restore to plaintiff his right to accrued leave with pay.

Government counsel representing defendants "appeared specially" and moved to dismiss the action with prejudice, on the grounds that the Court had no jurisdiction of the subject matter or of Secretary Forrestal and that the complaint fails to state a claim upon which relief could be granted. The motion was supported by a showing that Secretary Forrestal had not been served with process, that he had not waived service and that he had not appeared except to challenge jurisdiction of the court. On the remaining grounds of the motion the argument was, in substance, that it is apparent from the complaint that the alleged wrongful conduct of the Secretary of the Navy was,

under the statute pleaded, discretionary and that discretionary power lawfully conferred and duly exercised is not subject to judicial interference; that the forum of plaintiff's action is the Court of Claims; and that the action is, in effect, an action against the United States. These arguments were supported by persuasive authority. Nevertheless, for reasons hereafter appearing, if no motion to dismiss had been filed, the Court, sua sponte, would have and does now observe that it lacks jurisdiction to entertain the cause.

Jurisdictional allegations are that the matter in controversy exceeds, "exclusive of costs or interest, the sum of (3000) and arises under the Constitution and Laws of the United States." (Jud. Code § 24(1), 28 U.S.C.A. § 41(1). The complaint makes no other reference to the Constitution. The law pleaded is the Act of June 28, 1940, Public Law 671, 76th Congress, 54 Stat. 676, 50 U.S.C.A. App. § 1151-1156.) Plaintiff predicates his action on § 6 of that Act, which provides for reemployment of returned employees under the Civil Service Retirement Act of May 29, 1930, for suspension of retirement annuity payments during reemployment; deductions for annuity retirement, etc., all of which is preliminary to the following proviso:

> "That during the national emergency * * * the provisions of the Act of August 24, 1912 * * * shall not apply to any civil service employee of the War or Navy departments * * * whose immediate removal is, in the opinion of the secretary (of the Navy) concerned, is warranted by

> the demands of national security * * * Those persons summarily removed may, if in the opinion of the Secretary concerned and subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal * * *."

The Section further provides that within 30 days after removal a removed person may appear and be fully informed of the reason for his discharge and thereafter, within 30 days, he may make statements or affidavits of why he should be retained and not removed.

In substance, and so far as now pertinent, the complaint alleges that from November 6, 1926, to June 30, 1941, plaintiff was a federal civil service employee at Mare Island; that on or about the last mentioned date he was discharged by Rear Admiral W. L. Friedell, then Commandant of the Navy Yard; that on July 24, 1941, plaintiff was advised in writing by Friedell that his discharge was warranted by the demands of national security because a confidential investigation had disclosed that he did not possess the requisite loyalty to the United States by reason of his active association with an organization which advocated overthrow of the constitutional form of government of the United States; that thereafter plaintiff informed Friedell in writing (of facts on which he relied for his retention together with his personal opinion) why he should not have been discharged; that repeated

demands had been made on defendants and Friedell that plaintiff be fully informed of the reasons for his removal and for compensation; that defendants and Friedell had unlawfully failed and refused (to comply); and that plaintiff is without a remedy unless this court orders the relief prayed.

On its face the complaint shows that this action does not arise under the Constitution or any law of the United States. In other words no federal question is presented. (See Leather Manufacturers Bank v. Cooper, 120 U. S. 778; Campbell v. Chase National Bank, 2 Cir., 71 F. 2d. 669). To come within the jurisdiction of the District Court on the basis pleaded, more is required than that the right sought to be enforced originated in a federal law. (Cook County v. Calumet Etc. Co., 138 U. S. 635). It is at least debatable whether or not plaintiff has a right of action and if so whether it originated in the law relied on. To arise under a law of the United States an action must involve a controversy respecting the validity, construction or effect of the law pleaded, upon the determination of which the result depends (Shulthis v. McDougal, 225 U. S. 561, 569; In re Winn, 213 U. S. 458, 465; Fully v. First National Bank, 299 U. S. 109; Marshall v. Desert Properties Co., 9 Cir. 103 F. 2d 551; Chaskin v. Thompson, 9 Cir., 143 F. 2d 566; Bell v. Hood, 9 Cir., 150 F. 2d 97, 100; Barnhart v. Western Maryland Ry. Co., 2 Cir., 128 F. 2d 709; Miller v. Long, 4 Cir., 152 F. 2d 197).

The instant action has no relation to the validity, construction or effect of the law relied on. On the

contrary the subject matter, if any, is the failure of Rear Admiral Friedell (who, by the way, is not a party defendant) and these defendants fully to inform plaintiff of the reason for his discharge; and this in the face of pleading the written evidence of such information. The fact, if it be a fact, that plaintiff is remediless has no place in considering the question or jurisdiction, which is statutory.

The action will be dismissed for lack of jurisdiction.

It Is So Ordered.

A. F. St. Sure,
United States District Judge.

Dated: November 27, 1946.

[Endorsed]: Filed Nov. 29, 1946.

Appendix E

[Title of District Court and Cause.]

NOTICE OF APPEAL.
(Under Rule 73(B))

Notice Is Hereby Given that James A. Daggs, Plaintiff above named hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above-entitled action entered in this action on the 29th day of November, 1946.

Dated: January 10, 1947.

Gladstein, Anderson,
Resner & Sawyer,
Herbert Resner,
Norman Leonard,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1947.

Appendix F

[Title of District Court and Cause.]

MOTION TO DISMISS.

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him, and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds:

I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since said defendant had his official residence in the District of Columbia and is not an inhabitant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

IV.

That the complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will affect his rights, orders and statutory responsibilities and duties is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court.

Wherefore defendants pray that said complaint be dismissed with prejudice.

/s/ Frank J. Hennessy,
United States Attorney.
/s/ William E. Licking,
Assistant United States
Attorney,
Attorneys for Defendants.

[Endorsed]: Filed June 23, 1947.

Appendix G

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS.

The action of the Secretary of the Navy, through the Commandant of the Mare Island Navy Yard, in discharging plaintiff from his civil-service position was taken pursuant to statutory authority (50 USCA App. Sec. 1156). Plaintiff's complaint states, at most, an alleged improper exercise of that authority in failing, after dismissal, to fully inform plaintiff of the reasons for his removal. It does not state a case of extra-official action without legislative sanction. Whether plaintiff alleges facts entitling him to reinstatement or to an opportunity to be more fully informed of the reasons for his dismissal, the Secretary of the Navy in whom is vested the statutory power of dismissal and of reinstatement under 50 USCA App. Sec. 1156, is an indispensable party to the action. (Neher v. Harwood, 128 F. 2d 846, [9th Cir.] Cert. Denied Oct. 12, 1942.)

Ordered:

Defendants' motion to dismiss is granted for lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action.

Dated: August 5, 1947.

Louis E. Goodman,
United States District Judge.

[Endorsed]: Filed Aug. 5, 1947.

Appendix H

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73(B).

Notice Is Hereby Given that James Briato, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above entitled action entered in this action on the 5th day of August 1947.

Dated: August 11, 1947.

Gladstein, Andersen, Resner
& Sawyer,
Norman Leonard,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1947.

Appendix I

Before Denman, Bone, and Orr, Circuit Judges.

Orr, Circuit Judge.

Two separate suits were instituted in the District Court and motions to dismiss were heard before different judges. In the Daggs case the complaint was dismissed on the ground that no federal question was presented, and the Braito case was dismissed on the ground that the Secretary of the Navy, to whom we shall hereinafter refer as the Secretary, is an indispensable party. The cases were consolidated for argument and presentation on appeal.

The pertinent facts, as alleged in the complaints, are: Appellants Daggs and Braito were federal civil service employees stationed at Mare Island Navy Yard and were by order of the Secretary removed from service under the provisions of the Act of June 28, 1940, Public Law 671, 76th Congress, 54 Stat. 676, 50 U.S.C.A. Appendix, § 1156.

Rear Admiral W. L. Friedell was at the time Commandant of the Mare Island Navy Yard and was designated by the Secretary to impart to appellants the reasons for their removal in compliance with the requirements of the statute. Pursuant to such designation Friedell advised appellants that their dismissals were warranted by the demands of national security, because a confidential investigation had disclosed they did not possess the requisite loyalty to the United States by reason of their active association with an organization which advocated the overthrow of the

constitutional form of government of the United States. Thereafter, appellants informed Rear Admiral Friedell in writing [of facts on which they relied for their retention together with the personal opinion of each] why they should not have been discharged; that appellants made repeated demands on Friedell that appellants be fully informed of the reasons for their removal; that no further statement was given them. Appellants asked judgment of the court for an order that they be reinstated to their former employment, that they be compensated for the time lost, and that their rights to accrued leave with pay as the same existed at the date of discharge be reinstated.

While the ground given by the trial court for the dismissal of the Daggs case was the absence of a federal question, the motion to dismiss presented the ground that the Secretary of the Navy was an indispensable party. That question is present in both cases. Being of the opinion that dismissal of both cases is required on the ground that the Secretary is an indispensable party, the question of whether or not a federal question is presented need not be determined.

[1] There existed prior to December 8, 1947, considerable diversity of opinion and uncertainty in the circuits as to the circumstances which rendered a superior officer an indispensable party in a suit against an administrative official. This conflict and uncertainty was composed by the Supreme Court of the United States in the case of Williams et al. v. Fanning, Postmaster of Los Angeles, 332 U. S. 490, 68 S. Ct. 188. The Supreme Court in that case

chartered the way in which a solution to the question should be approached and announced a formula to be applied, namely, "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

[2] Applying that formula to the instant case the query is: Who would be required to act by a decree granting the relief which appellants seek? The answer is found in relating the character of the relief sought to the applicable law. First, appellants ask reinstatement. Question: To whom does the statute delegate the power to reinstate under the circumstances? Answer: To the Secretary. Second, the appellants ask that they be compensated for the time lost. Question: To whom does the statute give the power to order compensation for the time of discharge? Answer: To the Secretary, if he sees fit to reinstate, and while no specific provision is made in the statute as to accrued leave, it is a fair implication from the Act to say that in the event such power exists it rests with the Secretary. It seems clear that the relief sought in this case, in the event it was granted, would of necessity require the Secretary to take action by exercising directly a power lodged in him by the statute in question or under compulsion of a court decree. To no other person is the power of removal given, nor is the power of reinstatement placed in any other hands. Rear Admiral Friedell was the official designated by the Secretary to inform the appellants of the reasons for their removal and to receive the affidavits con-

taining the reasons they desired to show why they should have been retained and not removed. His functions were those of a subordinate through whom the Secretary was exercising some of the powers lodged in him (the Secretary) by law. The reasons that actuated the Secretary in ordering the removal were best known to him. It must be presumed that the Secretary dictated to Friedell the information in that respect to be communicated to appellants. It was not the function of Admiral Friedell to either enlarge upon or subtract from those instructions. Demands by appellants for a more particular statement of the reasons for their dismissal would of necessity be passed upon by the Secretary. Admiral Friedell could do no more than pass the demands on to him for action.

We think the foregoing analysis demonstrates the Secretary to be an indispensable party. It is admitted that the Secretary was not served; that he did not submit himself to the court's jurisdiction, and that without his consent no court, other than that of the District of Columbia where he resides, may acquire jurisdiction over him.

Rear Admiral Klein has replaced Rear Admiral Friedell as Commandant at Mare Island Navy Yard. No personal judgment is sought and in the absence of the Secretary of the Navy no decree can be entered "which will grant the relief desired by expending itself on the subordinate official who is before the court."

Order of dismissal is affirmed in each case.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

JAMES A. DAGGS and JOHN BRAITO,
Petitioners,

vs.

GROVER C. KLEIN, Rear Admiral, U. S. Navy, Commandant, Mare Island Navy Shipyard; and JAMES B. FORRESTAL, Secretary of the Navy,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 169 F. (2d) 174. It appears as Appendix I to the Petition for Writ of Certiorari.

II.

JURISDICTION.

A. Petitioners' actions were brought under various statutes of the United States as we have noted, viz., Title 28, United States Code, Section 1221, and Public Law 671 (effective June 28, 1940, 76th Congress, 54 Stat. 676, 60 U.S.C. App. 1156).

B. The jurisdiction of the Court of Appeals to entertain the appeal of the petitioners was based upon Title 28, United States Code, Section 1291.

C. The jurisdiction of this Honorable Court is based upon Title 28, United States Code, Section 1254.

D. The date upon which the Court of Appeals' opinion was filed was August 9, 1948. The mandate was issued on September 10, 1948.

III.

ABSTRACT OF THE CASES AND THE EVIDENCE.

The cases were instituted by the filing of complaints by petitioners in the District Court of the United States, for the Northern District of California, on May 6, 1946. Petitioner Braito filed a first amended complaint before the respondents had appeared on January 31, 1947. In the complaint of Daggs and in the first amended complaint of Braito, your petitioners alleged substantially as follows (wherever a difference appears in the two causes, it will be noted):

That the matter in controversy exceeded the sum of $3,000 and arose under the Constitution and laws of the United States; that your petitioner was a citizen of the United States and a resident of the City of Vallejo, County of Solano, State of California; that from November 6, 1926, until June 30, 1941 (a period of almost fifteen years),* petitioner Daggs was a Civil Service employee at the Mare Island Navy Shipyard, Mare Island (Vallejo), California; that during said period of time, the only organizations of which petitioner Daggs was a member were the free and accepted Masons and the United Federal Workers of America, CIO;** that the defendant Klein, at the time of the filing of the complaint, was the duly appointed and Acting Commandant of the said Navy Shipyard, succeeding W. L. Friedell, Rear Admiral of the United States Navy as said Commandant; that defendant, Forrestal, was the duly appointed and Acting Secretary of the Navy; that during all times mentioned in the complaint, defendants Klein and Friedell were acting with the knowledge and approval of the defendant, Forrestal; that on June 28, 1940, Congress passed Public Law 671, 76th Congress, which reads as follows:

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*Braito alleged that his employment in the Navy Shipyard began in 1919 and ran until 1922 and then resumed again in 1925 when he obtained civil service status and continued until July 24, 1941.

**Braito alleged that the only organizations of which he was a member were "two bona fide, long-established, fraternal organizations in this community, also a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable."

"Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. Sec. 652), shall not apply to any civil service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an oportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed."

That on June 30, 1941, petitioners were discharged from their civil service employment and were thereafter on July 24, 1941, informed by Friedell that the reason for their discharge was as follows (in each case the language used was identical):

"Since September, 1939, the United States of America has been under a condition of emergency

which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

"Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

"Mr. Daggs, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing."

That thereafter, petitioner Daggs informed said Friedell in writing as follows:

"In regards to the charges against me from the Navy Yard, here is my statement.

"I went to work on the Navy Yard Nov. 6, 1926. In that time I have put in about 13 years. I took an interest in my work and I always call my supervisor's attention to anything that was not right; my supervisor had me inspect the work of the other men when a job was finished.

"The last 4 years I have worked from 4 to 12 P.M., and week ends I work on my ranch so I have had no time to associate with members or organizations which would or would not advocate the overthrow of the Constitutional form of Government of the United States.

"I only belong to the United Federal Workers of America (C.I.O.) Union, and the Masonic Lodge. If either one of these organizations advocate the overthrow of our form of govenment I would like to be informed of that. Furthermore I have not attended any meetings of any kind, not even the Union or Masonic Lodge, and whoever investigated me and says that I had been to any meetings or that I am active in any organization or whatever it is I am supposed to have done, I say, 'It is a lie', and I would like to meet that person face to face and have them prove when I attended these meetings, and what associations or organitions I belong to outside of the two mentioned."

That thereafter, petitioner Braito informed said Friedell in writing as follows:

"In conformity with the proceeding of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you, to be informed of the reason for having been discharged, from employment at the Navy Yard (Mare Island), herewith I, John Braito, respectfully and truthfully, wish to submit to you Sir, this statement: "In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915, A. D.

"The solemn oath I took on the 26th day of August, 1915, in the Superior Court of San Francisco, on which day I became a citizen of the United States of America, is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

"I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

"I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High School, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly prepared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braito family.

"The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and city of Vallejo (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

"True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable.

"In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

"As I have been employed in Mare Island Navy Yard for about 19 years, I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

"If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter."

That thereafter, petitioners made repeated demands upon Friedell and upon the defendants, that they, petitioners, be fully informed of the reasons for their removal from their employment, as provided for in Public Law 671, and for their reinstatement as civil service employees at the said Navy Yard, together with compensation for the period of their removal, as provided for in Public Law 671; that Friedell and the defendants unlawfully failed and refused fully to inform petitioners of the reasons for their removal from their employment or to reinstate them or compensate petitioners, as provided for in Public Law 671; that at no time have petitioners ever been fully informed of the reasons for their discharge; that the aforesaid statement made by Friedell did not fully inform petitioners of the reasons for their discharge, and that the said statement was and is too vague and indefinite to enable petitioners to prepare and submit statements and affidavits referred to in Public Law 671, to show why petitioners should be retained and not removed; that petitioners believe that any further efforts on their part to procure voluntary action on the part of the defendants would be useless; that the only stated ground upon which petitioners were discharged was that they had been actively asso-

ciated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; that the failure to inform petitioners of the name or identity of said organization made meaningless and abortive the provision in Public Law 671 giving to a discharged employee, after having been fully informed of the reasons for his removal, the right to file statements or affidavits as he might desire, to show why he should be retained and not removed; that the failure to inform petitioners of the name or identity of said organization deprives petitioners of the right to set forth in any statement or affidavit whether they were actively associated with said organization and, if so, whether said organization did advocate the overthrow of the constitutional form of government of the United States, and if so, whether petitioners were a party to a working alliance with said organization to bring its program to fruition; that petitioners were entitled to notice and hearing, as provided for in Public Law 671, and were, by the acts set forth, denied said notice and hearing; that the said acts were and are in excess of the authority vested in Friedell and the defendants by Congress, and constitute a violation of Public Law 671 and a violation of petitioners' right to due process of law, as provided for in the Fifth Amendment to the Constitution of the United States; that petitioners are wholly without remedy unless the United States District Court directs defendants to reinstate petitioners and to compensate them for the period of their re-

moval, as provided for in Public Law 671; that unless the Court takes such action, petitioners will suffer irreparable injury; that at the time of their removal there was due to petitioner Daggs $150.00 and that the defendants failed and refused to pay this money, or any part thereof, to petitioner Daggs; that there was due to petitioner Braito certain accrued leave with pay amounting to approximately $400.00 and that the defendants failed and refused to pay this money, or any part thereof, to petitioner Braito.

Therefore, petitioners prayed that the defendants be ordered forthwith to reinstate them as civil service employees in the Mare Island Navy Yard, in the same capacity in which they were working at the time of their discharge; that the defendants be ordered to compensate them for the period of their removal at the rate of pay they were receiving at the time of their discharge; that the defendants be ordered to reinstate their right to accrued leave with pay as the same existed at the time of their discharge, and for such other relief as might be appropriate.

As indicated in the Petition for Writ of Certiorari, the actions were dismissed on motion of the Government, and so no evidence was ever taken.

The Court of Appeals having affirmed the dismissals upon the sole ground that the Secretary of the Navy was an indispensable party, we shall devote all of our consideration to that point.

IV.

ASSIGNMENTS OF ERROR.

A. The Court of Appeals erred as a matter of law and rendered an opinion contrary to the decided opinions of this Court in affirming the dismissal below. The decision was contrary to the decision of this Court in the case of *Williams v. Fanning,* 322 U.S. 490.

B. By affirming the order below, the Court of Appeals affirmed and gave effect to the District Court's error in dismissing the complaint and entering a judgment in favor of the respondents and against the petitioner.

C. By dismissing the appeal, the Court of Appeals affirmed and gave effect to the District Court's error in dismissing the above case on the ground that the case did not present a federal action.

D. By dismissing the appeal, the Court of Appeals affirmed and gave effect to the District Court's error in dismissing the appeal on the ground that the Secretary of the Navy was an indispensable party.

E. The District Court should have tried the case on its merits and should have found in favor of petitioner.

F. The Court of Appeals should have remanded the case to the District Court with instructions to try the case on its merits.

G. The order of the Court of Appeals affirming the dismissal of the District Court is contrary to the law.

V.

SUMMARY OF ARGUMENT.

A. PRELIMINARY.

Although the grounds urged by the respondents and considered by the District Courts were varied, the Court of Appeals put its opinion squarely upon the ground that the Secretary of the Navy was an indispensable party and for that reason refused to consider any of the other grounds urged and affirmed the dismissals on that ground alone. For that reason we will consider that point only in this brief.

B. THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY TO THESE SUITS.

The decision of this court in *Williams v. Fanning,* 322 U.S. 490, should put at rest once and for all the erroneous theory under which the Court of Appeals for the Ninth Circuit had been operating for many years, that is to say, that the mere fact that a subordinate officer acted under the direction or control of a superior required that the superior be joined as an indispensable party in the lawsuit. For as this Court pointed out, it is "immaterial" that a subordinate officer may be "under the command of his superior to do what the Court has forbidden". In such circumstances, of course, the subordinate officer is required to follow the mandate of the Court and the internal relationship between the subordinate and the superior officer in the department or agency involved is some-

thing which presumably must be worked out between them in a manner consistent with the Court's order.

It would appear from this Court's opinion in ***Williams v. Fanning,*** that the only time a superior officer is an indispensable party is when the decree sought will require ***him*** to take action. In this case, the decree sought would not require the Secretary of the Navy to take action. The commandant of the navy yard can accord the relief prayed for. The commandant, not the Secretary, employs persons in a civil service capacity. (cf. ***Murphy v. U.S.,*** 79 Fed. 225.) The commandant, not the Secretary, compensates employees for services rendered. The commandant, not the Secretary, pays the accrued leave.

To hold that merely because the Secretary is referred to in the statute (and the manner in which he is referred to and his function under the statute we will consider in a moment), despite the fact that the commandant is the one who actually operates the navy yard, he (the Secretary) is thereby an indispensable party, is to indulge in a tenuous and highly technical line of thinking, the net effect of which is to deprive petitioners and others similarly situated of relief from the arbitrary acts not of the Secretary, but of the commandant himself.

For under the statute it is the subordinate officer (the commandant) who has the duty of "fully informing" discharged employees of the reasons for their discharge, and in the cases now before the Court it was the subordinate officer (the commandant) who

failed to carry out the statutory duty imposed upon him. In connection with the subject matter of the complaints herein, to-wit, the failure fully to inform petitioners of the reasons for their discharge, there is no statutory obligation placed upon the Secretary. That obligation is placed upon the commandant and it was the commandant's failure to comply with the provisions of the statute which resulted in the illegal discharge and in the cause of action which is now being pressed.

That the analysis of the statute which we here make for the purpose of establishing that the Secretary is not an indispensable party is the proper way to approach these matters, is seen from the consideration of those cases of this Court wherein it was held that the superior officer was an indispensable party. In each of those cases it was perfectly apparent from the statute that Congress had imposed some duty or obligation upon the superior officer and the purpose of the lawsuit was to compel the superior officer to perform that duty or to restrain him from improperly performing it. In each case, the subject of the lawsuit was the duty imposed upon the superior officer and the Court quite properly held that the superior officer in those circumstances was an indispensable party to the suit.

For example, while in *Warner Valley Stock Co. v. Smith,* 165 U.S. 28, this Court recognized that the purpose of the suit was to "control the action of the Secretary of the Interior", and that "the principal relief sought was against him, and the relief asked

against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the order of his official head", yet basic to the Court's conclusion was the fact that the statute involved provided that it should be the duty of the Secretary of the Interior to make out certain designations of land and to cause a patent to be issued under certain circumstances. His subordinates merely carried out departmental instructions in connection with the designations *made by the Secretary himself*.

In the cases now before the Court, Congress did not provide that the commandant was merely to be a mechanical instrumentality of transmitting information from the Secretary to the employees concerned, but on the contrary that *the subordinate officer himself* had the obligation of fully informing the employees of the reasons for their discharge. Presumably the commandant could and did exercise an independent judgment concerning what in his view constituted full information and what information in his view had to be withheld for reasons which seemed sound to him. There is nothing to indicate that the commandant acted merely as an amanuensis who received a report from the Secretary and simply read it to the discharged. There is certainly nothing in the statute to suggest that such was the procedure, and petitioners know only that it was the commandant who called them to his office and discharged them and it was the commandant who made the inadequate disclosure of the reasons for the discharge. As far as petitioners

read the statute, and as far as their actual experience in these cases is concerned, they have never had any official connection with the Secretary of the Navy in reference to these discharges. Thus it is the action or lack of action of the commandant and not of the Secretary which gives rise to the complaints herein.

In *Gnerich v. Rutter*, 265 U.S. 388, an action was brought against a local prohibition director to enjoin him from giving effect to a restriction contained in plaintiff's permit to sell intoxicating liquor. The permit had been issued by a subordinate officer pursuant to certain general regulations promulgated by the Commissioner of Internal Revenue. In holding that the Commissioner was an indispensable party, this Court pointed out that *the statute specifically provided that the Commissioner and not his subordinate should have the power* and authority to issue permits and to prescribe the contents and form thereof.

Similarly, in *Webster v. Fall*, 266 U.S. 507, *the statute involved required the Secretary of the Interior* to cause funds to be paid to members of certain Indian tribes. The failure to join the Secretary was held by this Court to be fatal *because of this statutory provision*. In addition to the statutory mandate which placed the responsibility for the action directly upon the shoulders of the Secretary, the pleadings in that case, as summarized by the Court, indicate that the plaintiff himself recognized that the Secretary was the party against whom he ought to proceed for he alleged that the orders, rules and regulations of which he was complaining were issued under the statute by

the Secretary of the Interior and were in his view at least invalid and unconstitutional.

From these cases, and from the reasoning in *Williams v. Fanning* which reversed the Ninth Circuit's long-standing doctrine that the Postmaster-General was an indispensable party in the postal fraud cases, it is apparent that the view of this Court is that the subordinate officer cannot fail to comply with the duty which is imposed upon HIM by Congressional statute, and then when called to account for such failure in a federal District Court, seek to hide behind the Secretary who in turn contends that he cannot be sued anywhere save in the District of Columbia. If such a contention were to be accepted by this Court, it would in effect be reading out of the statute here involved the Congressional mandate that the discharged employee is entitled to be "fully informed of the charges against him by the designated officer".

CONCLUSION.

We desire to leave with the Court the final thought that if it be held that the Secretary of the Navy is an indispensable party in these proceedings, the petitioners and any other person similarly situated will be effectively deprived of the rights granted to them by Congress in Public Law 671. The effect of the Court of Appeals' holding means that petitioners will be required to expend the time, money and energy necessary to prosecute a lawsuit 3,000 miles from their

place of business, their place of employment and the place where the acts complained of occurred. It will mean that subordinate officers may freely disregard Congressional mandates with the assurance that only a wealthy litigant will be in a position to obtain a judicial review of arbitrary or unlawful action. The decision, if permitted to stand, will mean that governmental agencies will be permitted effectively to deny to citizens rights guaranteed to them by the Constitution of the United States or by acts of Congress without having to be called to account therefor, and that a citizen whose rights are so deprived will not have his day in Court, but on the contrary, will find that should he seek redress from the local federal tribunal, his case will not be heard on its merits, but he will be referred to the federal District Court in Washington, D. C.

These petitioners are not wealthy litigants. The record shows that they are mechanics who were employed as such by the government at a naval shipyard, and it is quite apparent that if they are not permitted to pursue their remedy in the district of their residence, employment, and place where the acts complained of occurred, but are required to go to the nation's capital to seek relief, they will in effect have been denied relief without ever having been heard upon the merits.

It is respectfully submitted that this honorable Court should grant a writ of certiorari and should order that the Secretary of the Navy is not an in-

dispensable party to these proceedings and should remand the cause to the Courts below for appropriate proceedings to carry into effect such a decision.

Dated, San Francisco, California,
November 3, 1948.

Respectfully submitted,

HERBERT RESNER,
Attorney for Petitioners.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
By NORMAN LEONARD,
Of Counsel.

INDEX.

CITATIONS.

CASES:

STATUTES:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 411

JAMES A. DAGGS, *Petitioner*

v.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard; and JAMES V. FORRESTAL, Secretary of the Navy.

No. 412

JOHN BRAITO, *Petitioner*

v.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard; and JAMES V. FORRESTAL, Secretary of the Navy.

On Petition For Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the Northern District of

California in No. 411 (No. 411, R. 13-18) and the order of the District Court of the United States for the Northern District of California in No. 412 (No. 412, R. 27-28) have not been reported. The opinion of the United States Court of Appeals for the Ninth Circuit (No. 411, R. 26-29) is reported at 169 F. 2d 174.

JURISDICTION

The judgments of the United States Court of Appeals for the Ninth Circuit were entered on August 9, 1948 (No. 411, R. 25, 30). On November 9, 1948, Mr. Justice Douglas extended petitioners' time to file a petition for writs of certiorari to and including November 15, 1948, "providing the statutory time has not already expired" (No. 411, R. 31). The petition for writs of certiorari was filed on November 12, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the suits included in the petition for a writ of certiorari have abated.

2. Whether the Secretary of the Navy is an indispensable party to an action for reinstatement and back-pay by a civil-service Navy Department employee dismissed from the Mare Island Navy Yard under the Act of June 28, 1940, 54 Stat. 679, 50 U. S. C. App. 1156, which authorized summary discharge of an employee "whose immediate re-

moval is, in the opinion of the Secretary [of the Navy] warranted by the demands of national security."

STATUTE INVOLVED

Pertinent portions of the Act of June 28, 1940, Public Law No. 671, 54 Stat. 676, 50 U. S. C. App. 1156, are set forth in the Appendix, *infra*, p. 15.

STATEMENT

These substantially identical actions, each dismissed on the complaint, present claims for reinstatement and back-pay by two Navy Department employees dismissed for reasons of national security under the Act of June 28, 1940.

1. On May 6, 1946, petitioner Daggs filed his complaint in the District Court for the Northern District of California, Southern Division, against Admiral Klein, then Commandant of the Mare Island Navy Yard and James V. Forrestal, then Secretary of the Navy (No. 411, R. 2-11). The jurisdictional allegation was that the matter in controversy exceeded $3,000 and arose under the Constitution and laws of the United States (No. 411, R. 2). Daggs alleged that from November 1926 until June 1941 he was a civil-service machinist at the Mare Island Navy Yard (No. 411, R. 3), and that on or about June 30, 1941 he was discharged from this employment (No. 411, R. 5). On July 24, 1941, he was informed by Rear Admiral Friedell, Commandant of the Navy Yard at that time, that his discharge "was warranted by

the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States" (No. 411, R. 5-6). He was told that within thirty days he had the privilege of submitting a written statement or affidavit (No. 411, R. 6); and shortly thereafter he informed Admiral Friedell in writing that he had had no time, for four years past, to associate with any members of organizations which would or would not advocate the overthrow of our constitutional form of government; that he belonged only to a Masonic Lodge and the United Federal Workers of America (C.I.O.); that he had not attended meetings of any kind, even of these organizations; and that he would like to meet his accuser face to face (No. 411, R. 6-7). The complaint goes on to allege that petitioner made repeated demands upon Admiral Friedell and upon the defendants (Admiral Klein and Secretary Forrestal) for a full statement of the reasons for his removal, for reinstatement, and for back pay; that these demands were not granted, and the only reasons for his discharge given to petitioner were those contained in the statement made by Admiral Friedell on July 24, 1941; and that this statement was too vague

and indefinite to permit petitioner to submit the statement or affidavits referred to in the Act of June 28, 1940 (Public Law No. 671) (No. 411, R. 7-8). Daggs further alleged that "during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives" (No. 411, R. 8-9), and that he should have been informed of the name or identity of the organization mentioned in Admiral Friedell's statement (No. 411, R. 9). Failure to accord him proper notice and hearing was alleged to be a violation of the Act of June 28, 1940, and of the Fifth Amendment (No. 411, R. 8).

The complaint concluded with an allegation that the plaintiff was without other remedy and, if not granted relief, would suffer irreparable injury, and prayed for an order (i) directing his reinstatement, (ii) requiring the defendants to compensate him for the period of removal at his former rate of pay, and (iii) requiring the defendants to reinstate his right to accrued leave with pay (No. 411, R. 9-10).

The respondents moved to dismiss the complaint on several grounds, including lack of jurisdiction over Secretary Forrestal and inability to maintain the suit in his absence since he was an indispensable party (No. 411, R. 11-12). The district court (Judge St. Sure) dismissed the action for lack of jurisdiction, on the ground that the complaint showed on its face that the action did not arise

under the Constitution or any law of the United States (No. 411, R. 13-18).

2. Petitioner Braito filed a similar complaint, on May 6, 1946, also in the Northern District of California, Southern Division (No. 412, R. 2-13). The jurisdictional allegation was the same (No. 412, R. 2). Braito alleged that he was a shipfitter at the Mare Island Navy Yard from 1919 to 1922, and a civil-service shipfitter's helper, shipfitter, and flange turner at the Yard from 1925 to July 1941 (No. 412, R. 3). On or about July 24, 1941, he was discharged from the Navy Yard, and on July 26, 1941, he was informed by Admiral Friedell of the reasons for his discharge in terms substantially identical with those given to Daggs, and also advised of his privilege to submit written statements or affidavits (No. 412, R. 5-6). On August 4, 1941, he informed Admiral Friedell, in writing, that he strongly denied all accusations of disloyalty to the United States; that he had never met any person or organization with the object of overthrowing our constitutional form of government; that he was a member of two bona fide and long established fraternal organizations, and of a labor organization (United Federal Workers of America) which he considered to be unquestionable; and that in view of his long employment he considered this statement sufficient but would supply further statements or affidavits, or appear personally, if requested (No. 412, R. 6-9).

Braito's complaint also contained allegations, virtually the same as those of Daggs', concerning his demands for and failure to receive adequate notice of the reasons for his discharge and a hearing; and concerning the lawfulness of his course of conduct, and his lack of remedy (No. 412, R. 9-11). The prayer for relief was likewise the same (No. 412, R. 12).[1]

As in Daggs' case, respondent moved to dismiss the suit on various grounds, including lack of jurisdiction over Secretary Forrestal and inability to proceed in his absence (No. 412, R. 25-26). The district court (Judge Goodman) dismissed the action for "lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action" (No. 412, R. 27-28).

3. Both plaintiffs appealed (No. 411, R. 18; No. 412, R. 28). The cases were consolidated for argument and presentation on appeal, and the court of appeals rendered one opinion affirming each dismissal on the ground that Secretary Forrestal was an indispensable party, under the rule of *Williams* v. *Fanning*, 332 U. S. 490 (No. 411, R. 26-29). The petition for writs of certiorari presents only that question (Pet. 5-6, 57, 58, 59-64).

[1] On January 31, 1947, Braito filed an amended complaint, adding an allegation that the defendants' action in removing him from employment without fuller disclosure abridged his freedom of speech, and of the press, his right peaceably to assemble, and deprived him of property without due process of law (No. 412, R. 22-23).

ARGUMENT

1. It is doubtful whether the petition for a writ of certiorari was timely filed in this Court. The final judgments of the court of appeals were entered on August 9, 1948 (No. 411, R. 25, 30). On November 9, 1948, Mr. Justice Douglas extended petitioners' time to file a petition for writs of certiorari to and including November 15, 1948, "providing the statutory time has not already expired." The petition was filed on November 12, 1948. If the former three-month time limit of Section 8(a) of the Act of February 13, 1925, 43 Stat. 936, governs, the petition is not out of time. If, however, the controlling time is the ninety-day limit of Section 2101 of Title 28 of the United States Code (as enacted by the Act of June 25, 1948, Public Law No. 773, 80th Cong., 2d sess.), the petition was filed too late, since the ninety-day period expired on November 7, 1948. We suggest that the governing requirement is that prescribed by the recent statute, which became effective on September 1, 1948 and repealed section 8(a) of the 1925 Act. Section 39 of the Act of June 25, 1948 provides that "any rights or liabilities now existing under" the repealed legislation "shall not be affected by this repeal," but we do not believe that this saving clause was designed to allow parties in petitioners' position to avail themselves of the former time limits for appeal or certiorari. Cf. Rules 73(a) and 86(b) of the Federal Rules of Civil Procedure, as

amended, 329 U. S. 866-7, 875; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314.

2. We have been informed by the Navy Department that respondent Rear Admiral Grover C. Klein, now assigned to the Navy Department in Washington, D. C., ceased to perform his functions and duties as Commander, Mare Island Naval Shipyard on April 2, 1947, and that he was succeeded in that office on the same day by Captain Wallace R. Dowd. Furthermore, respondent James V. Forrestal, who was appointed Secretary of Defense on July 27, 1947, pursuant to the Act of July 26, 1947, 61 Stat. 499, 500; 5 U. S. C., Supp. I, 171a, no longer holds the office of Secretary of the Navy, his successor, John L. Sullivan, having been appointed to that office on September 18, 1947. Thus, on August 9, 1948, when the judgments were entered by the court below, more than six months had elapsed since respondents had ceased to hold their respective offices as alleged in the complaints and more than six months had likewise elapsed since those offices had been filled by their successors.[2] At no time has any attempt been made to

[2] Sec. 11 of the Act of February 13, 1925, 43 Stat. 936, 941; 28 U. S. C. (1946 ed.) 780, which authorized the successors of federal and state officers who had ceased to hold their offices to be substituted in their stead within six months after their death or separation from office, was repealed, effective as of September 1, 1948, by Sec. 39 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess. But see Rules 25(d) and 81(a) of the Federal Rules of Civil Procedure which authorize substitution within six months after the successor takes office in situations where those Rules apply.

substitute their successors in their stead. Consequently, both of the suits have abated. *LeCrone* v. *McAdoo,* 253 U. S. 217; cf. *Benzian* v. *Saul Godwin,* No. 317, this Term, certiorari denied December 6, 1948. See also Rule 19(4) of the Rules of this Court.

3. The court of appeals properly applied the rule as to the indispensability of superior officers set forth in *Williams* v. *Fanning,* 332 U. S. 490, and there is no need for review of that issue, which is the only one petitioners raise. In the *Williams* case, the superior was declared an indispensable party "if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U. S. at 493. Under that principle, the Secretary of the Navy must be joined as a party defendant in the present actions. For petitioners are suing for reinstatement and back-pay "as provided for in Public Law No. 671" (the Act of June 28, 1940, *infra,* p. 17) (No. 411, R. 9; No. 412, R. 23), and that statute vests only the Secretary with authority to reinstate employees summarily removed for national security reasons, and conditions the allowance of compensation for the period of removal on such reinstatement. If petitioners are to secure the relief they pray, the Secretary must order their reinstatement, either directly or through some sub-

ordinate. The present commandant of the Mare Island Navy Yard—the subordinate official before the district court—has no power, under the statute, to reinstate petitioners, even if (as they claim) they were not given the full information of the reasons for their removal which the Act requires. Once the Secretary has summarily removed an employee, the commandant would not be authorized to reinstate him, without the Secretary's approval or concurrence. Cf. *Gnerich* v. *Rutter,* 265 U. S. 388.

The Secretary's indispensability is made plain by the nature of the case petitioners make. They expressly base their entire claim on the Act of June 28, 1940, properly construed (No. 411, R. 7-9; No. 412, R. 20-23; Pet. 5, 60-5). The complaints do not ask the court wholly to disregard that Act as invalid on its face, and to apply only the other statutes and regulations applicable to naval civil-service employees. Nor do petitioners attack their original summary removal by the Secretary as improper or invalid, and it is plain that under the statute the Secretary could act as he did, without prior hearing or disclosure of information. The gravamen of the claim is that petitioners did not, within thirty days of their removal, receive sufficiently full information to enable them to submit answering affidavits or statements as the statute allows (No. 411, R. 7-9; No. 412, R. 20-23). The conclusion is then drawn that, because of this alleged administrative failure to

comply with the statute's terms, petitioners are entitled by the Act to automatic reinstatement, with compensation for the period of removal. But assuming that to be true, the only official who could lawfully order their reinstatement would be the Secretary of the Navy who initially removed them and who alone has statutory authority to reinstate or retain them. A decree directing the relief desired by petitioners would, therefore, not expend itself on the Navy Yard commandant who is before the court, but would require action by the Secretary who is not, and cannot be made, a party. Cf. 332 U. S. at 494.[3]

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[3] Petitioners' brief places exclusive stress on the former commandant's alleged refusal to supply more complete information as to the reasons for the removal, and asserts that the complaint is directed against this subordinate's action (Pet. 60-1, 62-3, 64). But the prayers for relief request reinstatement and award of back-pay, and do not even mention the matter of a fuller statement of the reasons for the dismissals (No. 411, R. 10; No. 412, R. 23-4). Reinstatement—the relief requested—is clearly the Secretary's province, even if the subordinate had authority of his own to make a fuller disclosure. In any case, as the court below pointed out (No. 411, R. 28-9), there is no reason to believe that the scope or type of the information to be furnished is within the commandant's own authority. The statute merely declares that the removed employee "shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal * * *"; since the Secretary is the removing power, the reasons for removal are his and he has control over the amount and type of the information to be furnished to the dismissed employees. The commandant was simply an "official designated by the Secretary"—for the convenience of both petitioners

4. Moreover, petitioners' actions appear to be barred by laches. They were dismissed from employment in June or July 1941 (No. 411, R. 5; No. 412, R. 16), and suits were not filed until May 1946 (No. 411, R. 11; No. 412, R. 13). In cases of removed federal employees seeking judicial redress, the timely bringing of suit has been repeatedly stressed. *United States ex rel. Arant* v. *Lane,* 249 U. S. 367; *Nicholas* v. *United States,* 257 U. S. 71, affirming 55 C. Cls. 188; *Norris* v. *United States,* 257 U. S. 77; *Richardson* v. *United States,* 64 C. Cls. 233; *Arant* v. *United States,* 55 C. Cls. 327; *O'Neil* v. *United States,* 56 C. Cls. 89; *Morse* v. *United States,* 59 C. Cls. 139, appeal dismissed, 270 U. S. 151; *Goodwin* v. *United States,* 76 C. Cls. 218, certiorari denied, 289 U. S. 753; *Hart* v. *United States,* 91 C. Cls. 308. Delays of eleven months (*Norris* v. *United States, supra*), thirteen months (*Morse* v. *United States, supra*), and twenty months (*United States ex rel. Arant* v. *Lane, supra*) have been held sufficient to sustain the defense of laches. In the instant cases, almost five years elapsed between petitioners' discharges and the commencement of their actions.

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and the Secretary—to inform petitioners of the Secretary's reasons. For the subordinate to supply other or more extensive information would require the Secretary's concurrence or authorization.

CONCLUSION

The decision below is correct, and the sole issue presented here is governed by a recent decision of this Court. We respectfully submit that the petition for writs of certiorari should be denied.

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DECEMBER 1948.

APPENDIX

The Act of June 28, 1940, ch. 440, 54 Stat. 676, 679, Sec. 6, 50 U. S. C., App. 1156, provides in pertinent part:

> * * * That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; U. S. C., title 5, sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: *And provided further,* That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.

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